87-1442 (1)

UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
FEB 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

ALDO A. AUIDI,

Petitioner,

VS.

NO. _____

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

WILLIAM A. DIMITRI, JR., ESQ.
733 Douglas Avenue,
Providence, Rhode Island 02908
(401) 273-9092,
Counsel for Petitioner.

EDWARD JOHN MULLIGAN, ESQ.
474 Broadway,
Pawtucket, Rhode Island 02860
(401) 727-1190,
Counsel for Petitioner.

35pp

QUESTIONS PRESENTED

I. IF A PERSON'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES IS VIOLATED BY LOCAL POLICE, SHOULD THE APPLICATION OF THE EXCLUSIONARY RULE DEPEND UPON WHICH SOVEREIGN IS PROSECUTING?

II. WILL LOCAL POLICE OFFICERS BE DETERRED FROM CONDUCTING ILLEGAL SEARCHES IF THE FRUITS OF THEIR ILLEGAL SEARCHES ARE ADMISSIBLE IN FEDERAL PROSECUTION AS OPPOSED TO STATE PROSECUTION?

III. DOES THE PRESENCE OF AN ATF (ALCOHOL, TOBACCO AND FIREARMS) OFFICER, WITH HIS REGULATORY POWER TO INSPECT BOOKS AND RECORDS OF A FIREARMS DEALER, LEGITIMIZE THE PRIOR ILLEGAL SEIZURE OF EVIDENCE BY LOCAL POLICE?

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PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 29, 1987 affirming the Petitioner's conviction of various federal firearm statutes.

OPINION BELOW

Petitioner was found guilty by a jury in the United States District Court for the District of Rhode Island and sentenced to serve five (5) years imprisonment and fined $50,000.00. The Petitioner's appeal of his conviction was affirmed by the United Stated Court of Appeals for the First Circuit on December 29, 1987, in an opinion published at ____F.2d____ (1987). No petition for rehearing was filed.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Petitioner's conviction was affirmed by the United States Court of Appeals for the First Circuit on December 29, 1987. This petition is filed timely within sixty (60) days from said date.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses...against unreasonable searches and seizures shall not be violated...

Title 18, U.S.C. §923 (g). (See, Appendix).

STATEMENT OF THE CASE

Petitioner was convicted of various violations of federal firearms laws, based upon the introduction into evidence of several firearms seized from his house by the state's local police officers.

Prior to trial, a suppression hearing was held wherein the trial judge ruled that the state police officers' search of the Petitioner's residence (also a place of business) was illegal because the search warrant was defective. Nevertheless, the trial judge ruled that, because the Petitioner was also a licensed firearms dealer and his residence was listed as his place of business, The Bureau of Alcohol, Tabacco and Firearms, United States Department of the Treasury ("ATF") had a supervening right of entry without the necessity of a warrant.[1]

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[1] 18 U.S.C. §923(g). This section of the Gun Control Act of 1968 was substantially modified in 1986. A copy of this section, as it appeared in 1985, is appended hereto.

Because an ATF agent was present at the premises during the state police officers' search (although well after the search had begun), the seizure of the firearms was ruled to be at his direction and therefore admissible.

On appeal to the United States Court of Appeals for the First Circuit, the Appellate Court assumed that Appellant's contention was correct, i.e., that the seizure was in fact made by the state police officers without a valid warrant. Nevertheless, the court ruled that the evidence should not be excluded. The Appellate Court is of the opinion that this evidence should be suppressed in the State Court, at the trial on state charges, but that this evidence should not be suppressed in Federal Court because the "cost" of doing so would be too great. The Petitioner's conviction was affirmed on the theory that the exclusionary rule should

not be applied in this Federal prosecution because its purpose would not be served in discouraging lawless searches and seizures by state police officers. The Court of Appeals reasoned that because ATF has statutory authority to enter and inspect the business premises without a warrant (and seize contraband in plain view), then any illegal seizure made by other governmental authority, state or federal, would not discourage lawlessness by ATF. Therefore, such evidence is admissible in a federal prosecution.

The decision of the Court of Appeals is contrary to this Court's holding in Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed 2d 1669 (1960).

The facts relevant to the search of the Appellant's premises are as follows:

Appellant was a federally licensed firearms dealer who ran a gun shop from his resi-

dence at 71 St. Louis Avenue, Woonsocket, Rhode Island. Sometime prior to September 24, 1985, an ATF Agent, Monty Monteiro, received information that Appellant was dealing in stolen firearms. However, the ATF was not conducting any active investigation of the Appellant. The Woonsocket Police Department was actively investigating the Appellant based upon information they had that he was receiving stolen goods. Prior to September 24, 1985, the Woonsocket Police exchanged information with Agent Monteiro of ATF concerning the Appellant; but their investigations were otherwise separate and independent of each other.

On September 24, 1985, the Woonsocket Police sought and obtained a search warrant for 71 St. Louis Avenue and other property belonging to the Appellant. Prior to the execution of the warrant, the Woonsocket Police telephoned Agent Monteiro and advised

him of the imminent raid and asked him to provide technical assistance regarding any firearms which may be found at Appellant's residence. The Woonsocket Police were previously told by Agent Monteiro that firearms were kept at the premises and that Agent Monteiro suspected those firearms to be in violation of federal firearms statutes.

At the time Agent Monteiro arrived at 71 St. Louis Avenue, the search was already in progress and the firearms were already seized. Agent Monteiro was then shown numerous firearms by the Woonsocket Police. He concluded, after inspection, that those firearms should be seized as they were in violation of the federal firearms laws. The Woonsocket Police confiscated those firearms and transported them to the police station. Thereafter, those firearms were turned over to the federal government.

The Petitioner was subsequently indicted for a number of federal firearms violations. Before trial, the Petitioner moved to suppress the evidence obtained by the Woonsocket Police on the grounds that the warrant obtained by the Woonsocket Police was invalid. The basis for said motion was that the affidavit used in support of the application for the search warrant did not even mention the word "firearms", nor did it assert that the Woonsocket Police expected to look for, or find, any firearms. In fact, the police officer who presented the application for the search warrant testified that he verbally told the State Judge, who issued the warrant, about the firearms that they expected to find. The police officer specifically omitted any mention of the firearms in the affidavit, however, because he did not want to therein reveal the basis of his knowledge.

During the hearing on the motion to suppress, the trial judge refused, however, to suppress the evidence because he found that the firearms were seized at the direction of the ATF agent and, therefore, by ATF rather than by the Woonsocket police. Since ATF is authorized by 18 U.S.C. §923(g) to conduct warrantless searches, no warrant was required and, therefore, suppression of that evidence was not necessitated. The petitioner was convicted on all counts and sentenced to five (5) years imprisonment and fined $50,000.00.

On appeal to the First Circuit Court of Appeals, the Petitioner claimed that the firearms were seized by the Woonsocket Police prior to Agent Monteiro's arrival at 71 St. Louis Avenue and therefore the Trial Judge erred in not suppressing the evidence. The Court of Appeals affirmed the conviction. The Court assumed that the

petitioner's argument was correct (that the firearms were in fact seized by the Woonsocket police), but held that the exclusionary rule should not be applied.

REASON FOR GRANTING THE WRIT

This Court has prohibited the introduction of illegally seized evidence by state police officers in federal prosecutions in Elkins vs. United States, 364 U.S. at 223 (1960). Elkins plugged a loophole that existed as a carryover from the days in which the Fourth Amendment had not been applied to state conduct (prior to Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed 1782 (1949)) -- a loophole that permitted the admission of illegally seized evidence in federal court if the seizure was by a state rather than a federal officer -- by holding that evidence which had been seized by a state officer rather than a federal

officer, in violation of the Fourth Amendment, was inadmissible in federal court.

Justice Stewart, for the majority wrote:

> The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts. Yet when a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.
> United States v. Elkins, supra.

In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed 2d 1081 (1961), this Court held that evidence seized in violation of the U.S. Constitution "is, by same authority, inadmissible in a state court". And the Mapp Court went on to say that "were it otherwise, then just as without the Weeks rule (Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 (1914)), the assurance against

unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention...". Justice Clark concluded in Mapp by "holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments."

The Court of Appeals decided this issue by stating that "the exclusionary rule is a judicially created remedy" whose sole purpose is to deter police misconduct and its application depends upon the "cost-benefit" balancing test. United States v. Aiudi, ____F.2d____(1987). The Court went on to state that the deterrence factor would be sufficiently served in this case by suppressing this evidence in the state court only. But, the Appellate Court found little, if any, deterrence value in suppressing this evidence in this federal prosecution.

Although the most recent decision of this Court in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed 2d 677 (1984), and Illinois v. Krull, ___U.S.___, 107 S.Ct. 1160, 942 L.Ed 2d 364 (1987), suggests that the exclusionary rule's primary purpose is the deterrence of future police misconduct, there are other equally important reasons for the exclusionary rule which the Court of Appeals failed to consider in its decision.

There is, for example, what the Elkins Court referred to as "the imperative of judicial integrity", namely, that the courts not become "accomplices, in the willful disobedience of a Constitution they are sworn to uphold. This language from Elkins was also relied upon in Mapp and again in Terry v. Ohio, 392 U.S. 1 , 88 S.Ct. 1868, 20 L.Ed 2d 889 (1968), where the Court explained:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

Another purpose of the exclusionary rule, as more recently stated most clearly by some members of the Court, is that:

> of assuring the people -- all potential victims of unlawful conduct -- that the government would not profit from its lawless behaviour, thus minimizing the risk of seriously undermining popular trust in government.
> United States v. Calendra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed 2d 561 (1974)(dissent).

This reason was enunciated in Weeks:

> To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the constitution, intended for the protection of the people against such unauthorized action.
> Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed 652 (1914).

The same notion is implicit in the Mapp declaration that "no man is to be convicted on unconstitutional evidence".

The Appellate Court's opinion does not consider or serve the other reasons for the exclusionary rule. The Appellate Court's decision will not even serve the deterrence factor in that a local police officer will know that if he illegally searches a gun shop,[2] a liquor establishment,[3] a coal mine,[4] a junk yard,[5] and possibly other business establishments,[6] then any evidence found of

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2 State v. Biswell, 406 U.S. 311, 32 L.Ed 2d 87, 92 S.Ct. 1593 (1972).

3 Colonnade Catering Corp v. United States, 397 U.S. 72, 25 L.Ed 2d 60, 90 S.Ct. 774 (1970).

4 Donovan v. Dewey, 452 U.S. 594, 69 L.Ed 2d 362, 101 S.Ct. 2534 (1981).

5 New York v. Burger, 482 U.S. ____, 96 L.Ed 2d 601, 107 S.Ct. ____, (1987).

6 See Id., 96 L.Ed 2d 601, 625, n. 5 (dissent).

federal violations will be admitted by a federal court. Contrary to the Appellate Court's opinion, this decision if allowed to stand will encourage, not deter, illegal searches by state officers.

This decision releases the state police from the restrictions of the Fourth Amendment by providing an avenue for the admissibility of the fruits of the illegal seizure in a federal prosecution.

Respectfully submitted,

Oleg Nikolyszyn

OLEG NIKOLYSZYN, ESQ.
733 Douglas Avenue
Providence, Rhode Island 02908
(401) 273-9092

AFFIDAVIT OF SERVICE

I, OLEG NIKOLYSZYN, under oath, state that on on this 26th day of February, 1988, I caused three (3) copies of the within Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit to be deposited in the United States post office, with first class postage prepaid, and addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530, and

Margaret E. Curran
Assistant United States Attorney
Federal Courthouse & Building
Kennedy Plaza
Providence, RI 02903

Oleg Nikolyszyn
OLEG NIKOLYSZYN, ESQ.

STATE OF RHODE ISLAND
COUNTY OF PROVIDENCE

Subscribed and sworn to before me on this 25th day of February, 1988.

Dolores L. Bucci
DOLORES L. BUCCI/NOTARY PUBLIC
My Commission Expires: 6/30/91

United States Court of Appeals
For the First Circuit

No. 87-1463

UNITED STATES OF AMERICA,

Appellee,

v.

ALDO A. AIUDI,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
(Hon. Francis J. Boyle, U.S. District Judge)

Before

Coffin and Breyer, Circuit Judges,

and Caffrey,* Senior District Judge.

Oleg Nikolyszyn for appellant.

Margaret E. Curran, Assistant United States Attorney, with whom Lincoln C. Almond, United States Attorney, was on brief for appellee.

December 29, 1987

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*Of the District of Massachusetts, sitting by designation.

CAFFREY, Senior District Judge. The appellant, Aldo Aiudi, challenges his conviction for various violations of the federal firearms statutes. The sole issue on appeal is whether the district court properly admitted evidence seized during a search of appellant's property.

I.

The appellant was a firearms dealer who ran a gun shop from his residence at 71 Saint Louis Avenue, Woonsocket, Rhode Island. Aiudi was licensed by the Bureau of Alcohol, Tobacco and Firearms ("ATF"), an executive agency under the auspices of the United States Department of Treasury. The ATF is authorized to monitor the businesses of firearms dealers and may conduct investigations of any irregularities brought to its attention.

Sometime prior to September 24, 1985, the ATF received information that Aiudi was dealing in stolen firearms, knowingly dealing with convicted felons and failing to properly record his transactions. The ATF also had reason to believe that Aiudi had illegally possessed and intended to sell several machine guns and stolen handguns. According to an ATF informant, Aiudi was keeping these weapons in a safe located on the Saint Louis Avenue property in Woonsocket.

At the time the ATF began to investigate Aiudi, the Woonsocket police had suspected for some time that Aiudi was receiving stolen goods in violation of state law. Consequently, the police had already been conducting their own inquiry into Aiudi's business dealings prior to the ATF investigation. The ATF and the Woonsocket police cooperated with each other and exchanged information concerning the appellant's activities. Otherwise, the investigations remained independent.

On September 24, 1985, the Woonsocket police executed a warrant authorizing a search of the Aiudi property. Prior to the search, the police contacted Monti Monteiro, the ATF agent in charge of the investigation, to inform him of the planned raid and request his assistance. Agent Monteiro proceeded to 71 Saint Louis Avenue where he found the search already in progress.

Upon arriving, Agent Monteiro reviewed Aiudi's firearms records and the inventory of firearms kept on the premises.

As a result of this review, Agent Monteiro concluded that there was evidence of several federal firearms violations. He instructed the Woonsocket police to seize all of the weapons located on the premises including the firearms used to convict Aiudi at trial. The weapons were placed in a large truck which the Woonsocket police had brought to the scene to transport the evidence they had expected to seize for their own purposes. These firearms were later turned over to the federal government.

Aiudi was subsequently indicted for a number of federal criminal charges. The defendant moved to suppress the evidence obtained during the search on the grounds that the warrant obtained by the Woonsocket police was invalid and therefore, the search and seizure violated his Fourth Amendment rights. Although the district court agreed with the appellant that the warrant obtained by the Woonsocket police was fatally defective, the court refused to suppress the evidence because of its finding that no valid warrant was required for an ATF search and seizure. The court reasoned that Agent Monteiro was authorized by 18 U.S.C. §923(g) to conduct a warrantless search and seizure on the premises.[1] Since the evidence was removed from the premises by the Woonsocket police per Agent Monteiro's instructions, no Fourth Amendment right was violated. The defendant was subsequently convicted on all counts and filed this appeal. For the reasons stated below, we affirm the district court.

II.

The appellant has framed the issue on appeal as whether the firearms were illegally seized by the Woonsocket police prior to the time the ATF agent arrived at the scene. Starting with the premise that evidence which is seized by state officers in violation of the Fourth Amendment cannot be turned over to the federal government for use in a federal prosecution, the appellant argues that it is irrelevant that Agent Monteiro had authority to conduct a warrantless search and seizure because the weapons were effectively seized by the Woonsocket police

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[1]Section 923(g) has been substantially modified since the events at issue in this case took place.

before Agent Monteiro arrived. Because the police did not have a valid warrant, the evidence must be excluded as the fruits of an illegal search. The appellant further asserts that the district court made no finding as to when the seizure occurred.

The government argues for its part that the seizure of the weapons worked no Fourth Amendment wrong because the state officers in this case acted with and at the direction of a federal officer who had authority to seize the weapons without a warrant. The seizure was therefore a federal seizure which was lawful in spite of the concededly defective warrant obtained by the Woonsocket police.

We agree with the appellant that the district court did not specifically address the issue of whether the weapons might already have been seized within the meaning of the Fourth Amendment before Agent Monteiro arrived at the Aiudi premises. We find, however, that this issue has little relevance in determining whether the appellant was entitled to suppression of the evidence. For even assuming that the appellant is correct in his contention that the weapons were in fact seized by the Woonsocket police in violation of the Fourth Amendment, it does not necessarily follow that the evidence must be excluded.

The exclusionary rule is a judicially created remedy designed to effectuate the Fourth Amendment guarantees against unreasonable searches and seizures, not a personal right of a criminal defendant. United States v. Calandra, 414 U.S. 338, 348 (1974); Stone v. Powell, 428 U.S. 465, 486 (1976). Its purpose is to deter police misconduct by eliminating the incentive for police officers to disregard constitutional requirements on the chance they may turn up evidence which would incriminate a defendant. Stone v. Powell, 428 U.S. at 492. It is well recognized that the costs of the rule may in some instances outweigh the benefits it provides in terms of deterring police misconduct. United States v. Leon, 468 U.S. 897, 908 (1983); Stone v. Powell, 428 U.S. at 493.

Without regard for the foregoing principles, the appellant relies on Elkins v. United States, 364 U.S. 206 (1960), to prove that a federal prosecutor may not use evidence illegally seized by state officers. This reliance is misplaced. Elkins does not

state that such evidence may never be used by federal prosecutors under any circumstances. Instead, Elkins teaches that federal prosecutors cannot use evidence illegally procured by state officials when the "evidence [was] obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures. . ." Id. at 223. The Elkins rule was designed to protect Fourth Amendment rights by eliminating the incentive for federal law enforcement officials to encourage lawless searches and seizures by state officers. Id. at 221-222. Where, as in this case, no incentive exists for federal officials to encourage misconduct by state police, exclusion of state-seized evidence is inappropriate without first considering whether the benefit obtained from excluding the evidence outweighs the resulting costs.

Turning to the case at hand, we find that the benefit to be obtained from applying the exclusionary rule is insignificant when compared to the costs. In this case, the ATF had authority to enter the Aiudi premises without a warrant, search the records and inventory of the appellant and seize whatever evidence of firearms violations its agent uncovered. The ATF did not need the assistance of the Woonsocket police to acquire this evidence. Because the ATF could legally do exactly what the appellant claims the Woonsocket police did unlawfully, admitting this evidence at trial does not give the ATF an incentive to encourage state law enforcement officials to violate the safeguards afforded by the Fourth Amendment. Nor would it cause federal officials to be less sensitive to their own responsibilities under the Constitution. Thus, to prohibit the federal government from using the evidence at issue in this case would serve only to penalize the government for the misconduct of others.

It is true that exclusion of this evidence may deter the Woonsocket police from future unlawful conduct. However, we think that this benefit is minimal in light of the penalty that exclusion would impose on the federal government in this case. The record shows that the Woonsocket police had entered the Aiudi premises to search for evidence that the appellant had violated state law, not federal. Consequently, the state police had only an

indirect interest in the prosecution of Aiudi for federal criminal violations. The evidence would presumably be excluded at a state trial on the alleged state offenses; this is a more 'close-fitting' deterrent for the violations here. On the other hand, the ATF had already committed time and resources to its own independent investigation of Aiudi's activities at the time the Woonsocket police executed the invalid search warrant. More importantly, an ATF agent was present when the search and seizure was concluded. Contrary to appellant's assertions, this is not a case where the federal government simply sat back and allowed illegally seized evidence to be handed to them on a "silver platter." Cf. Elkins v. United States, 364 U.S. at 208. To exclude this evidence would result in the waste of time and energy on the part of the ATF through no fault of its own.

It should also be noted that to exclude this evidence may well be costly in terms of its effect on the commendable practice of state and federal cooperation in criminal investigations. If this evidence is excluded, federal officers may hesitate to involve state officials in future investigative efforts for fear that an error on the state's part would destroy many months of effort on the part of federal agents. Where federal agents have the authority to conduct warrantless searches and seizures, it would be foolhardy to risk the fruits of an investigation by seeking assistance from state officials who do not have such authority.

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES
VS.
ALDO A. AIUDI

C.R. No. 86-056B

February 13, 1987
9:30 a.m.

Federal Building
Providence, RI

BEFORE THE HONORABLE FRANCIS J. BOYLE

APPEARANCES:

FOR THE PLAINTIFF...MARGARET E. CURRAN, AUSA

FOR THE DEFENDANT...OLEG NIKOLSZYN, ESQ.

I believe that such as the books which they — the records kept by Mr. Aiudi.

MS. CURRAN: Your Honor, those items were not seized on September 25th.

THE COURT: The firearms records, you're not talking about the cameras and the coins and the cartons of cigarettes and things like that?

MR. NIKOLSZYN: Those other items do not play a part in this prosecution, so I don't believe it's relevant.

THE COURT: That's my point.

MR. NIKOLSZYN: I was speaking of the firearms records themselves.

THE COURT: And records themselves.

MR. NIKOLSZYN: But I understand they were not seized now, so obviously, that doesn't really go anywhere.

MS. CURRAN: Your Honor, if I may explain on that, the records, the firearms records, including the bound book and the form were turned over by Mr. Aiudi's counsel at the request of the U.S. Attorney's Office, I believe in December of 1985.

THE COURT: The issue in this matter is whether or not Mr. Aiudi had an expectation of private enterprise with respect to the items that were in his home which also happened to be apparently his place of business. The evidence is that the — there was an ongoing investigation, both state and federal, with respect to his activities. The police department of the City of Woonsocket obtained a search warrant which authorized the search of his premises and the seizure of certain items. Clearly the affidavit in support of the warrant is not support including firearms as a part of items to be seized. And indeed the affidavit itself was — appears to be somewhat fatal in that it provides no information with respect to the reliability of the informant upon which Lieutenant Tempest formed his belief, so that it would appear that there's little question but that the initial affidavit, the initial seizure that occurred here was illegal and in violation of the Fourth Amendment. The Government argues, and with some merit it seems to me, that there is a supervening right here; that is, that the federal government and in its administration of gun control laws has the authority by statute and had at the time to inspect the premises without a warrant,

to examine the records without a warrant, and to seize any contraband found, again, without a warrant. In substance and in fact it seems to me that's what happened. That may very well be Mr. Monteiro did not have an 18 wheel truck to haul away the avails, that, as Captain Remillard just told us, he was given instructions by Mr. Monteiro that "any firearms in the premises should be seized by us," that is, taken by possession of — by the Woonsocket Police Department; and it seems to me that is a practical solution to a logistics problem that must have existed at the time with all of these items that were involved. It may not have been the most effective way to resolve the problem, it might have been better had the officer, the immediate recall officer taken possession of the items which supported a charge of federal offenses, but it was a practical solution to a practical problem which ought not to create a situation where if the Government's contentions here are correct that it would bar the Government from prosecuting the defendant with respect to these items. As I have said, no warrant was required, no valid warrant was obtained, the items were in fact seized; and it seems to me at Mr. Monteiro's direction. It wasn't a perfect bust, to say the least. The record certainly should have been taken at the time. But the Constitution doesn't require perfection, it requires only that an individual's expectations to privacy be respected. In this instance, to the extent that there are such expectations, they were respected. Under the circumstances, the defendant's motion to suppress the evidence is denied. Defendant may have an exception.

Now, this case is on the calendar for what, March 10th?

CLERK: The call is the 9th and impanelling the 11th.

THE COURT: On the 11th? March 11th? Were there any other motions pending?

MR. NIKOLSZYN: No, your Honor.

MS. CURRAN: No, your Honor.

THE COURT: All right, court will be in recess.

(ADJOURNED AT 10:48 A.M.)

be "sniper's gun" was fair comment on evidence of case. United States v Kowalski (1974, CA7 Ill) 502 F2d 203, cert den 420 US 979, 43 L Ed 2d 660, 95 S Ct 1407.

99. Verdict

Where conviction was possible on either ground that appellant falsely stated his criminal record or falsely stated his address, and appellant prevailed on the former issue, reversal is appropriate where jury returned a general verdict of guilty. United States v Williams (1972, CA8 Mo) 464 F2d 927, later app (CA8 Mo) 484 F2d 428.

100. Penalty

Only purpose in looking to state law, in prosecution for violation of 18 USCS §§ 922 and 924, is to determine maximum penalty which could have been imposed. United States v Place (1977, CA10 Wyo) 561 F2d 213, cert den 434 US 1000, 54 L Ed 2d 496, 98 S Ct 643.

Maximum penalty that could be imposed for violation of 18 USCS § 922(h), under circumstances of case, would be fine not to exceed $5,000 and imprisonment for more than 2 years. United States v Hairston (1977, DC Ill) 437 F Supp 33.

101. Harmless error

Destruction by government agents of tangible evidence material to a pending criminal prosecution did not require reversal of a conviction under 18 USCS § 922 where there was no hint of bad faith or deliberate suppression of evidence which might reasonably have exculpatory value to defendant, the evidence was photographed prior to destruction, the residue of detonated hand grenade fuses and samples from containers of gunpowder and the photographs were all made available to defense counsel, and defendant has pointed to no concrete area of prejudice due to the disposition of these articles; delivery of a pistol and its container to the jury for use in its deliberations was harmless error, even though government inadvertently failed to make a formal introduction of the exhibit and the record is confused as to whether the judge and counsel in fact understood the pistol as having been offered and received into evidence, where a proper foundation for admission of the gun into evidence was laid and the witnesses were subjected to cross-examination concerning its purchase. United States v Shafer (1971, CA7 Ill) 445 F2d 579, cert den 404 US 986, 30 L Ed 2d 370, 92 S Ct 448.

102. Revocation of license

Evidence showing that plaintiff was aware of state law requiring firearm delivery to be withheld for at least 72 hours after application for its purchase by having been previously advised on requirements supported Secretary of Treasury's decision to revoke license based on wilfullness of plaintiff's actions. Mayesh v Schultz (1973, DC Ill) 58 FRD 537.

103. Forfeiture of firearm

Appellant's acquittal on criminal charges under 18 USCS § 922(a) does not entitle him to return of firearms that were subject of forfeiture proceeding, even if such firearms formed basis of criminal prosecution. Glup v United States (1975, CA8 Neb) 523 F2d 557.

Acquittal on charge of having violated 18 USCS § 922(a)(1) which makes it unlawful for any person except licensed dealer to engage in business of dealing in firearms or ammunition, is not a bar to civil administrative action by government for forfeiture of such weapons and ammunition arising out of same facts on which criminal proceeding was based. Epps v Bureau of Alcohol, Tobacco & Firearms (1973, DC Tenn) 375 F Supp 345, affd without op (CA6 Tenn) 495 F2d 1373.

104. Attorney disciplinary proceedings

Conviction of attorney for aiding and abetting receipt of ammunition by convicted felon in violation of 18 USCS §§ 922(h) and 2, which constitutes "serious crime," and felony under federal law, warranted suspension from practice of law for 12 months. Re Robson (1978, Alaska) 575 P2d 771.

§ 923. Licensing

(a) No person shall engage in business as a firearms or ammunition importer, manufacturer, or dealer until he has filed an application with, and received a license to do so from, the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. Each applicant shall pay a fee for obtaining such a license, a separate fee being required for each place in which the applicant is to do business, as follows:

(1) If the applicant is a manufacturer—

(A) of destructive devices or ammunition for destructive devices, a fee of $1,000 per year;

(B) of firearms other than destructive devices, a fee of $50 per year; or

(C) of ammunition for firearms other than destructive devices, a fee of $10 per year.

(2) If the applicant is an importer—

(A) of destructive devices or ammunition for destructive devices, a fee of $1,000 per year; or

(B) of firearms other than destructive devices or ammunition for firearms other than destructive devices, a fee of $50 per year.

(3) If the applicant is a dealer—

(A) in destructive devices or ammunition for destructive devices, a fee of $1,000 per year;

(B) who is a pawnbroker dealing in firearms other than destructive devices or ammunition for firearms other than destructive devices, a fee of $25 per year; or

(C) who is not a dealer in destructive devices or a pawnbroker, a fee of $10 per year.

(b) Any person desiring to be licensed as a collector shall file an application for such license with the Secretary. The application shall be in such form and contain such information as the Secretary shall by regulation prescribe. The fee for such license shall be $10 per year. Any license granted under this subsection shall only apply to transactions in curios and relics.

(c) Upon the filing of a proper application and payment of the prescribed fee, the Secretary shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter [18 USCS §§ 921 et seq.] and other applicable provisions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license.

(d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

(A) the applicant is twenty-one years of age or over;

(B) the applicant (including, in the case of a corporation, partnership, or association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation, partnership, or association) is not prohibited from transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce under section 922(g) and (h) of this chapter [18 USCS § 922(g) and (h)];

(C) the applicant has not willfully violated any of the provisions of this chapter [18 USCS §§ 921 et seq.] or regulations issued thereunder;

(D) the applicant has not willfully failed to disclose any material information required, or has not made any false statement as to any material fact, in connection with his application; and

(E) the applicant has in a State (i) premises from which he conducts business subject to license under this chapter [18 USCS §§ 921 et seq.] or from which he intends to conduct such business within a reasonable period of time, or (ii) in the case of a collector, premises from which he conducts his collecting subject to license under this chapter [18 USCS §§ 921 et seq.] or from which he intends to conduct such collecting within a reasonable period of time.

(2) The Secretary must approve or deny an application for a license within the forty-five-day period beginning on the date it is received. If the Secretary fails to act within such period, the applicant may file an action under section 1361 of title 28 [28 USCS § 1361] to compel the Secretary to act. If the Secretary approves an applicant's application, such applicant shall be issued a license upon the payment of the prescribed fee.

(e) The Secretary may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has violated any provision of this chapter [18 USCS §§ 921 et seq.] or any rule or regulation prescribed by the Secretary under this chapter [18 USCS §§ 921 et seq.]. The Secretary's action under this subsection may be reviewed only as provided in subsection (f) of this section.

(f)(1) Any person whose application for a license is denied and any holder of a license which is revoked shall receive a written notice from the Secretary stating specifically the grounds upon which the application was denied or upon which the license was revoked. Any notice of a revocation of a license shall be given to the holder of such license before the effective date of the revocation.

(2) If the Secretary denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation. In the case of a revocation of a license, the Secretary shall upon the request of the holder of the license stay the effective date of the revocation. A hearing held under this paragraph shall be held at a location convenient to the aggrieved party.

(3) If after a hearing held under paragraph (2) the Secretary decides not to reverse his decision to deny an application or revoke a license, the Secretary shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation. In a

proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding. If the court decides that the Secretary was not authorized to deny the application or to revoke the license, the court shall order the Secretary to take such action as may be necessary to comply with the judgment of the court.

(g) Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe. Such importers, manufacturers, dealers, and collectors shall make such records available for inspection at all reasonable times, and shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulations prescribe. The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer, or collector for the purpose of inspecting or examining (1) any records of documents required to be kept by such importer, manufacturer, dealer, or collector under the provisions of this chapter [18 USCS §§ 921 et seq.] or regulations issued under this chapter [18 USCS §§ 921 et seq.], and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises. Upon the request of any State or any political subdivision thereof, the Secretary may make available to such State or any political subdivision thereof, any information which he may obtain by reason of the provisions of this chapter [18 USCS §§ 921 et seq.] with respect to the identification of persons within such State or political subdivision thereof, who have purchased or received firearms or ammunition, together with a description of such firearms or ammunition.

(h) Licenses issued under the provisions of subsection (c) of this section shall be kept posted and kept available for inspection on the premises covered by the license.

(i) Licensed importers and licensed manufacturers shall identify, by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Secretary shall by regulations prescribe, each firearm imported or manufactured by such importer or manufacturer.

(j) This section shall not apply to anyone who engages only in hand loading, reloading, or custom loading ammunition for his own firearm, and who does not hand load, reload, or custom load ammunition for others.

(Added June 19, 1968, P. L. 90-351, Title IV, § 902, 82 Stat. 231; Oct. 22, 1968, P. L. 90-618, Title I, § 102, 82 Stat. 1221.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section became effective 180 days after June 19, 1968, as provided by § 907 of Act June 19, 1968; see Effective date note under 18 USCS § 921.